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No. 04-444

In The

Supreme Court of the United States

MELITA PICCIOTTO AND ATHENA PICCIOTTO,
PETITIONERS,

vs.

MICHAEL C. GILLERAN AND OTHERS,
RESPONDENTS.

On Petition For Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth of Massachusetts

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the rulings of the Massachusetts appellate courts in *Melita Picciotto v. Robert V. Costello,* Appeals Court No. 2002-P-1003, raise any federal question for this Court to review.

2. Whether the rulings of the Massachusetts appellate courts in *Travelers Indemnity Company v. Stefano Picciotto*, Appeals Court Dockets Numbers 2003-J-0274 and 2003-P-925, constitute a final judgment within the meaning of 28 U.S.C. §1257.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

This Brief in Opposition is submitted on behalf of Michael G. Gilleran and the law firms with which he was associated, Gilleran & Mortensen, P.C. and Pepe & Hazard, LLP; Albert Zabin and the law firms of Schneider, Reilly, Zabin & Costello, P.C. and Schneider Reilly LLP; Joel Eigerman and the law firm of Roche, Carens & DeGiacomo, P.C.; Edwin McCabe and the law firm of The McCabe Group, P.C.; and Edward Greer (collectively "Respondents" or "the Law Firms.")

Gilleran & Mortensen, P.C., Schneider, Reilly, Zabin & Costello, P.C., Roche, Carens & DeGiacomo, P.C., and the McCabe Group, P.C. have no parent corporations and no publicly held company owns 10% or more of their stock.

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STATEMENT OF THE CASE

The Petitioners Melita and Athena Picciotto request this Court to review two decisions of the Massachusetts appellate courts for alleged constitutional infirmities. Their Petition is the latest act in a lengthy drama that began in 1983. The Respondents believe that a brief review of the earlier scenes in this drama will assist the Court in determining that the issues raised by the Petition are either not ripe for review or raise no substantial federal question.

The Petition has its genesis in a toxic tort action filed in the Superior Court Department, Essex County Division, of the Massachusetts Trial Court in March 1983 (the "Toxic Tort Action"). The plaintiffs in that action included Stefano and Judith Picciotto (the parents of the Petitioners Melita and Athena Picciotto), the Picciottos' business, Foreign Car Center, Inc., and Juan Nunez, an employee of Foreign Car Center. The plaintiffs alleged that emissions from a neighboring tannery, Salem Suede, Inc., injured the health of the individual plaintiffs and the business of Foreign Car Center. After the plaintiffs changed counsel several times, the case was tried to a jury in 1993, resulting in a judgment for the plaintiffs. The judgment was affirmed on appeal in 1996. *Foreign Car Center, Inc. v. Salem Suede, Inc.*, 40 Mass.App.Ct. 15, 660 N.E.2d 687 (1996).

The Petitioners Melita and Athena Picciotto were not parties to the Toxic Tort Action. In 1994, while the original case was pending on appeal, Mr. and Mrs. Picciotto and Foreign Car Center filed a new state court lawsuit against Salem Suede. The new lawsuit included Melita and Athena Picciotto as plaintiffs, but no

discovery was taken in the new case and the case was never tried.

After the judgment in the Toxic Tort Action was affirmed on appeal, Salem Suede's insurer, Travelers Indemnity Company, disclaimed coverage. The plaintiffs in the Toxic Tort Action brought a lawsuit against Salem Suede, seeking to collect their judgment, and against Travelers, claiming that Travelers engaged in unfair claims settlement practices in violation of Massachusetts law. Salem Suede then sought protection under Chapter 11 of the Bankruptcy Code. The lawsuit against Travelers was removed to the Bankruptcy Court and became an adversary proceeding in the Salem Suede Chapter 11 case. On January 6, 1999, after the claimants changed counsel several additional times, Travelers agreed to settle all the claims pending against Salem Suede (including the new lawsuit filed in 1994) for a lump sum payment of $9 million. The Travelers settlement agreement did not allocate the settlement proceeds among the claimants, who by this time included Melita and Athena Picciotto as well as the plaintiffs in the original Toxic Tort Action, Mr. and Mrs. Picciotto, Foreign Car Center, and Juan Nunez (collectively, the "Settling Claimants").

By the time of the settlement in 1999, the Settling Claimants had been represented by eight different law firms. Under Massachusetts law, an attorney who has appeared on behalf of a party in a lawsuit has a lien for the fair value of his services on any proceeds of the lawsuit. Mass.Gen.Laws. c. 221, §50. Given the likelihood that some of the law firms would assert a lien, Travelers insisted on a provision in the settlement agreement that it would not be required to

pay the settlement proceeds until all liens had been resolved. In an effort to satisfy this provision, the Settling Claimants demanded that the law firms release their liens, but most of the law firms refused. Travelers then paid the Settling Claimants $500,000, initiated an interpleader action in the Superior Court for Suffolk County pursuant to Massachusetts Rule of Civil Procedure 22 (the "Interpleader Action") and deposited the balance of $8,500,000 with the clerk of the court. The trial court dismissed Travelers from the Interpleader Action and realigned the parties, designating as plaintiffs five law firms which sought compensation for the work they had performed (the "Law Firms") and as defendants the Settling Claimants (including Melita and Athena), who denied that the Law Firms were entitled to any compensation and counter-claimed for malpractice, breach of fiduciary duty and other alleged wrongdoing.

The Interpleader case was tried to a jury for 63 days, beginning in late September 2001 and ending with a verdict on January 5, 2002. The jury found for the Law Firms, awarding them substantial fees and rejecting all of the Settling Claimants' allegations of malpractice and other misconduct. After deciding certain additional issues that it had reserved for itself, the trial court entered judgment on October 24, 2002. With interest at 12%, the total judgment in favor of the Law Firms came to $3,509,376, plus costs of $255,094.09. (In their Petition, Melita and Athena allege that they were subjected to a "penalty interest rate," Petition at 7, but the rate applied by the trial court is applicable in all Massachusetts contract actions. See Mass.Gen.Laws c. 231, §6C.) After the trial court denied their post-trial motions, the Settling Claimants filed notices of appeal. The court reporter is still preparing the massive trial

transcript, so the appeal in the Interpleader Action has not yet been docketed with the Massachusetts Appeals Court.

In May 2001, after discovery was complete in the Interpleader action and shortly before jury selection was scheduled to begin, Melita and Athena filed a separate lawsuit against the Law Firms and sought to have their new lawsuit consolidated with the Interpleader Action. The trial court denied their motion as untimely. After the jury verdict in the Interpleader Action, the trial court dismissed the separate lawsuit on the grounds that a prior action raising the same claims, the Interpleader Action, was already pending. The trial court also ruled that the issues raised by Melita's and Athena's separate lawsuit were barred by collateral estoppel.[1] Melita and Athena appealed from the judgment dismissing their separate lawsuit, but their appeal was rejected by the Massachusetts Appeals Court in a brief memorandum opinion, which is reproduced in the Appendix to the Petition for Certiorari at pages d-e. The Supreme Judicial Court denied Melita and Athena's request for further appellate review on June 30, 2004. Petition Appendix at page a.

While the Interpleader Action was pending in the trial court, the Settling Claimants (including Melita and Athena) filed numerous motions seeking distribution of the funds deposited by Travelers with the clerk of court. In response, the trial court released funds to the Settling Claimants totaling in the aggregate $ 3.2 million. Taken together with the $500,000 paid by

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[1] A copy of the trial court's Rulings Upon the Defendant Parties' Motions to Dismiss is included in the Supplemental Appendix to this Brief at page 16.

Travelers when it filed the Interpleader Action, the total amount distributed to the Settling Claimants prior to the jury's verdict came to $3.75 million.[2] Dissatisfied with these distributions, the Settling Claimants filed three interlocutory appeals seeking the release of additional funds, all of which have been denied by the Massachusetts appellate courts.

The second case covered by the Petition now before this Court arises from the most recent attempt to obtain a distribution of the funds being held by the trial court. In June 2003, Melita and Athena Picciotto filed a petition with the Massachusetts Appeals Court pursuant to Mass.Gen.Laws, c. 231, §117, a statute which authorizes the appellate courts to suspend or modify any order of the trial court pending appeal.[3] The relief they sought was an order directing the clerk of court to distribute approximately $2 million to them as their share of the Travelers settlement. A single justice of the Appeals Court denied the petition "for failure to show that the extraordinary relief sought is warranted under these circumstances" (see Petition Appendix at page f) and a three judge panel of the Appeals Court affirmed on the grounds that Melita and Athena had failed to demonstrate any abuse of discretion. Petition Appendix at pages b-c. The Supreme Judicial Court denied further appellate review on June 30, 2004 at the same time that it denied further review in Melita and Athena's separate

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[2] These calculations are based on the trial court's Order for Distribution to the Appellants for Fees and Costs of Appeal dated April 15, 2004. Most distributions were made to an attorney who represented all the Settling Claimants. However, $200,000 of the funds were earmarked for a law firm that represented Melita and Athena individually. See Petition at 6.

[3] The text of c. 231, §117 is set forth in the Statutory Appendix to this Brief at page 15.

action against the law firms. Petition Appendix at page a. This Petition for Certiorari followed.

SUMMARY OF ARGUMENT

The separate lawsuit brought by Melita and Athena against the Law Firms was dismissed on adequate state law grounds. The dismissal raises no substantial federal question.

The Interpleader Action has not yet been docketed with the Massachusetts Appeals Court and no final judgment within the meaning of 28 U.S.C. §1257 has yet been rendered in that case. The statute under which Melita and Athena proceeded, Mass.Gen.Laws, c. 231, §117, gives the appellate court discretion to temper the effect of a judgment or other trial court order pending appeal, but is not intended to substitute for full appellate review in the ordinary course. No abuse of discretion has been shown in this case. The Petitioners may seek appellate review of all orders entered by the Trial Court, including any orders relating to the distribution of funds and any alleged improprieties in the conduct of the trial, once the appeal from the judgment in the Interpleader Action has been docketed.

In any event, the premise of the Petition for Certiorari, that Melita and Athena are entitled to $2 million of the Travelers settlement, is in fact in dispute. There is no judgment or written agreement demonstrating their entitlement to that amount. A separate declaratory judgment action to determine the respective interests of the Settling Claimants in the remaining escrow fund is now pending in the Massachusetts

Superior Court. The Petition for Certiorari seeks to do an end run around the pending case and should be denied for that additional reason.

ARGUMENT

I. The Dismissal of Melita's and Athena's Separate Lawsuit Raises No Substantial Federal Question.

Melita and Athena Picciotto ask this Court to grant certiorari in two cases: first, their appeal from the judgment of the Suffolk Superior Court dismissing their separate lawsuit against the law firms; and second, their appeal from the denial of their petition pursuant to Mass.Gen.Laws c. 231 §117 for relief pending appeal. The first of these cases is undoubtedly a final judgment within the meaning of 28 U.S.C. §1257, but the case raises no substantial federal question.

In dismissing Petitioners' separate lawsuit, the trial court ruled that dismissal was required because there was a prior lawsuit, the Interpleader Action, raising substantially the same issues already pending in the courts of the Commonwealth. Supplemental Appendix, *infra* at 20-21. The trial court's ruling was firmly based in state law. Massachusetts has a well-settled rule against claim splitting that is now incorporated in Massachusetts Rule of Civil Procedure 12(b)(9). See *Keen v. Western New England College*, 23 Mass.App.Ct. 84, 86-7, 449 N.E.2d 310, 311-12 (1986) and cases cited. The trial court also ruled that the claims that Melita and Athena sought to raise in their separate lawsuit had already been rejected in the Interpleader Action, either by the court in granting partial summary

judgment for the law firms or by the jury in their verdict on the remaining claims, and were therefore barred by collateral estoppel. Supplemental Appendix, *infra* at 21-22. Under Massachusetts law, a judgment may be final for purposes of issue preclusion even though an appeal is pending. *O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 201, 692 N.E.2d 39, 44 (1998). Noticeably absent from the trial court's ruling and from the brief memorandum opinion of the Appeals Court is any discussion of the Constitutional issues that the Petitioners seek to bring before this Court.

Since the Petitioners' separate lawsuit against the Law Firms was dismissed on state law grounds, there is no basis for granting certiorari in that case.

II. The denial of the Petitioners' Petition under Mass.Gen.Laws c. 231, §117 is not a Final Judgment.

To qualify as "final judgment" within the meaning of 28 U.S.C. §1257, the state court judgment must be "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry.Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945) quoted with approval in *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Measured against this standard, the denial of Petitioners' Petition under Mass.Gen.Laws c. 231, §117 does not qualify as a final judgment.

Mass.Gen.Laws c. 231, §117 provides, in relevant part:

> After an appeal has been taken from a final judgment of the superior court,....the appellate

> court may, by an order, on terms or otherwise, suspend the execution or operation of the order appealed from, **pending the appeal,** and may modify or annul any order made for the protection of the rights of the parties, **pending the appeal;**....(emphasis supplied).

The relief that the statute contemplates is clearly interlocutory in character. Under §117, the appellate court may make appropriate orders to protect the rights of the parties while the case is pending on appeal, but these orders are temporary in nature and are not intended as a substitute for appellate review of a final judgment on a full record. Decisions under the predecessor of §117, Mass.Gen.Laws c. 214, §22, confirm that the statute permits the appellate court to "preserve the status quo upon conditions," *Brown v. Massachusetts Port Authority*, 371 Mass. 395, 403, 357 N.E.2d 928, 932 (1976), but does not authorize the court to decide the merits of the appeal. *Handy Cafe, Inc. v. Costello Distributing Co.*, 334 Mass. 707, 708, 137 N.E.2d 218, 218-19 (1956).[4]

The Massachusetts appellate judges who dealt with Melita and Athena's petition understood the limited role they were supposed to play under the statute. The single justice who first dealt with the petition ruled that the Picciottos had failed "to show that the extraordinary relief sought is warranted in these circumstances." Petition Appendix at page f. The appellate panel who reviewed the

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[4] Mass.Gen.Laws c. 214, §22 formerly granted the Supreme Judicial Court the power to suspend or modify orders of the trial court pending appeal. When Massachusetts adopted new rules of appellate procedure, the legislature enacted c. 231, §117, which confers the same power on the "appellate courts." St. 1973, c. 1114.

single justice's decision affirmed it on the grounds that "the Picciottos have failed to demonstrate any abuse of discretion in the denial of relief." Petition Appendix at page e. Both the single justice and the appellate panel treated the Picciottos' petition as raising a question of discretionary relief. Neither dealt with the constitutional issues that the Picciottos ask this Court to review.

Denial of the Petition for Certiorari will not foreclose the Petitioners' right to seek appellate review of their constitutional claims. The Petitioners have filed a notice of appeal in the Interpleader Action. The transcript is being prepared and in due course the appeal will be docketed with the Massachusetts Appeals Court. The Petitioners will then be able to press their constitutional claims in the Massachusetts appellate courts and, if appropriate, in this Court, based on a full record of what transpired in the trial court.

Indeed, some of the incidents that the Petitioners cite to show that proceedings in the trial court were "without dignity or decorum," Petition at 3, can only be reviewed on a full record. For example, the Petitioners claim that a partner of one of the attorneys seeking fees had an *ex parte* meeting with the trial judge, at which he offered the trial judge a "prestigious social position." Petition at 5, n.3. In a memorandum denying the Petitioners' motion to disqualify, however, the trial judge explained that the *ex parte* meeting was a brief encounter in a courthouse corridor, and the "prestigious social position" was an offer to serve in the alumni organization of a law school, an offer which the trial judge immediately refused.[5] There cannot be meaningful review of this issue

[5] The trial court explained its position in a Ruling upon the Picciotto Parties' Motion for Recusal dated February 2,

without a full appellate record. Compare *Minnick v. California Department of Corrections,* 452 U.S. 105, 127 (1981).

Similarly, the Petitioners complain that the jurors heard evidence "while dressed in Halloween costumes." Petition at 11. Respondents recall, however, that the jurors in the Interpleader Action sought permission from the trial court to wear costumes on Halloween day. The trial court consulted the attorneys for the parties, including the attorney for the Picciottos, and, hearing no objection, granted the jurors' request. The full record will show whether this incident was an affront to the dignity of the court, as the Petitioners claim, or a harmless diversion to relieve the tedium of a very long trial.

Since the state appellate courts have not completed their review of the Interpleader Action—indeed, have not begun their review—the Petition for Certiorari to review the denial of the Picciottos' daughters' petition under Mass.Gen.Laws c. 231, §117 should be denied.

III. The Petitioners have failed to demonstrate that they have been denied a Property Interest.

The premise of the Petitioners' claim is that they have been denied an unquestioned right to $2 million of the $9 million settlement with Travelers Indemnity Company. Yet the Petitioners fail to cite any judgment or other court order establishing their right to $2 million, and in fact there is none. The pleadings in the

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2002. That ruling will be part of the appellate record once the appeal in the Interpleader Action is docketed.

Interpleader Action did not address the allocation of the settlement proceeds among the Settling Claimants. Moreover, the settlement agreement with Travelers does not allocate the proceeds among the Settling Claimants. What then is the basis for the Petitioners' assertion that $ 2 million is theirs by right?

Although the Petition for Certiorari is silent on the question, discovery in the Interpleader Action demonstrated that the Petitioners' claim is based on an oral allocation agreement among the Settling Claimants reached at some point during the settlement negotiations with Travelers. The precise terms of that agreement are, however, hotly disputed. In January 2004, Juan Nunez, one of the Settling Claimants, filed suit in Suffolk Superior against the other Claimants, including Melita and Athena, seeking a declaratory judgment concerning the distribution of whatever settlement funds remain after payment of the judgment in favor of the Law Firms. In his complaint, Mr. Nunez alleges that, under the oral allocation agreement, he is entitled to receive $3 million net of any payments to the Law Firms. Mr. Nunez also estimates that, if the Law Firms are paid and he receives the full amount to which he is entitled, the balance remaining in the registry of the court for distribution to Mr. and Mrs. Picciotto, Foreign Car Center, and the Picciotto daughters will be approximately $180,000.[6]

Before they can argue that they have been deprived of $2 million without due process of law, Melita and Athena Picciotto must establish that they have a right to $2 million. They have not yet done so. Their

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[6] See the Complaint filed by Mr. Nunez in *Juan Nunez v. Stefano Picciotto et al.,* Suffolk Superior Court Civil Action No. 04-0289.

Petition for Certiorari is an attempt to short-circuit the lawsuit brought by Mr. Nunez to establish the respective rights of the Settling Claimants to the remaining proceeds. For this additional reason, the Petition for Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari of Melita and Athena Picciotto should be denied.

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STATUTORY APPENDIX

Massachusetts General Laws c. 231

Section 117. Temporary appellate relief from final judgments pending appeal.

After an appeal has been taken from a final judgment of the superior court, the land court, the housing court of the city of Boston, the western division of the housing court department, the northeastern division of the housing court department, the southeastern division of the housing court department or the housing court of the county of Worcester, the appellate court may, by an order, on terms or otherwise, suspend the execution or operation of the final judgment appealed from, pending the appeal, and may modify or annul any order made for the protection of the rights of the parties, pending the appeal; but, until such order has been modified or annulled, the justice of the superior court by whom the final judgment appealed from was made, or any other justice of said court, or the justice of the land court, the judge of the housing court of the city of Boston, the western division of the housing court department, the northeastern division of the housing court department, the southeastern division of the housing court department, or the housing court of the county of Worcester, by whom the judgment appealed from was made, may make any proper interlocutory orders, pending such appeal, including orders for the appointment of receivers, of injunction, of prohibition, and orders for continuing in force such orders previously made, or for modifying or dissolving them. The justice or judge who makes any such interlocutory orders may enforce them by appropriate proceedings, pending the appeal.

SUPPLEMENTAL APPENDIX

Rulings Upon the Defendant Parties' Motions to Dismiss
in
Melita Picciotto v. Robert V. Costello et al.,
Suffolk Superior Court
Civil Action No. 01-2319-G.

Ruling

1. All defendants have effectively moved to dismiss all claims of the plaintiffs Melita Picciotto and Athena Picciotto. Those motions include the following.

   (a) The motion to dismiss the first amended verified complaint, docketed as entry 6 on or about August 9, 2001, and submitted by defendants Robert V. Costello, Albert P. Zabin, and JoAnne D'Alcomo, individually and as partners in a partnership known as Schneider, Reilly, LLP; defendant Schneider, Reilly, Zabin & Costello, P.C.; and Schneider, Reilly, LLP (collectively "the SRZC parties").

   (b) Defendant Edward Greer's joinder in the SRZC motion to dismiss the amended complaint docketed as entry 16 on or about August 22, 2001.

   (c) The joinder in the SRZC motion to dismiss the amended complaint docketed as entry 7 on or about August 7, 2002, and submitted by defendants Michael C. Gilleran individually and as a partner in the partnership known as

Pepe & Hazard, LLP, Pepe & Hazard LLP, and Gilleran & Mortensen, P.C. (collectively "the Gilleran parties").

(d) The motion of defendant Joel Eigerman to dismiss the amended complaint, docketed as entry 11 on or about August 11, 2001.

(e) The motion of defendants Edward McCabe and the McCabe Group, P.C., to dismiss the first amended complaint, docketed as entry 12 on or about August 16, 2001.

(f) The motion of the defendant Travelers Indemnity Company to dismiss Count Six of the amended complaint.

2. Upon consideration of the original and the amended complaint, all motion materials, all opposition materials, and all pertinent record materials in the prior action of *Zabin, et al. v. Picciotto, et al.*, Suffolk Superior Court Civil Action No. 99-1594-A, the court hereby *ALLOWS* all defendants' motions to dismiss with prejudice the claims of the amended complaint (i.e. all claims)of the present action.

GROUNDS

1. The claims of the amended complaint reduce to the charge that each of the defendants wrongfully interfered with receipt by Melita and Athena Picciotto respectively of $1.5 million and $.5 million agreed by the six Picciotto parties (Stefano, Judith, Foreign Car Center Corporation, Melita, Athena, and Juan Nunez) to be distributional shares of the Travelers settlement of January 6, 1999, for Melita and Athena. The means of interference was the assertion of fee claims by the lawyers and law firms and their litigation efforts effectively causing the placement of the majority of the settlement proceeds into escrow until adjudication of their fee claims; and the Interpleader action of Travelers Indemnity Company effectively accomplishing the same result. The claims of the lawyers and law firms and the action of Travelers became *Zabin, et al.* v. *Picciotto, et al.*, Suffolk CA 99-1594. That action has proceeded through extensive pretrial discovery and motion practice resulting in summary judgment disposition of certain Picciotto parties' counterclaims; and through an extensive trial resulting in jury verdicts in favor of all the lawyers and law firms for substantial fees and reimbursable expenses to be paid by the Picciotto parties.

2. In this action, filed more than two years after commencement of Civil Action 99-1594-A, Melita and Athena charge the following against the attorneys, law firms, and/or Travelers Indemnity Company.

(a) *Count One.* Tortious interference with the entitlement to their settlement shares by the Gilleran parties by reason of those parties' post-settlement efforts to collect fees for services rendered to the Picciotto parties, including communication with Travelers and assertions of claims and escrow measures in Civil Action 99-1594-A.

(b) *Count Two.* Tortious interference with the same settlement share entitlements by reason of the efforts of the SRZC parties to detain the settlement proceeds in escrow and to pursue fee collection in Civil Action 99-1594-A.

(c) *Count Three.* Tortious interference of the same kind on the part of the individual attorneys Robert V. Costello and Michael C. Gilleran.

(d) *Count Four.* Tortious interference and bad faith assertion of Chapter 93A claims by individual attorneys Costello and Greer.

(e) *Count Five.* Tortious civil conspiracy by all the individual attorneys and their law firms to characterize the claims and entitlements of Melita and Athena as valueless and to deprive them of those entitlements by excessive fee liens and detention of settlement proceeds in Civil Action 99-1594-A.

(f) *Count Six.* Tortious civil conspiracy by Travelers Indemnity Company with the Gilleran parties to deprive the Picciotto parties, and Melita and Athena in particular, of

their settlement proceeds, by tactics in Civil Action 99-1594-A, including the evasion of discovery and the detention of the majority of settlement funds in interpleader escrow.

3. *Prior pending action. Mass. R. Civ. P. 12(b)(9).* Melita and Athena are parties to Civil Action 99-1594-A. They have been represented by counsel throughout that litigation. In the course of that prior pending proceeding they have made in substance the same claims against the same attorneys and law firm as appear in the present Counts One through Five; and at all times could have made precisely the same claims as the present ones in Civil Action 99-1594-A. Those essential common claims are that the attorneys do not have valid fee and lien claims; and that their detention of the settlement proceed in the interpleader escrow fund is therefore unmeritorious and wrongful. These claims at all times formed essential issues of the prior pending action.

   (a) In Civil Action 99-1594-A, the court addressed these assertions by all the Picciotto parties against all attorney parties as counterclaim counts for (a) abuse of process, and (b) civil rights violations; and entered summary judgment against the Picciotto parties upon those counts. Docket entry 367 dated June 19, 2001.

   (b) Further, the validity of the claims to fees and recovery of expenses by each attorney and law firm went forward to trial and resulted in

favorable verdicts for each. Docket Entry 498 dated January 7, 2002.

(c) Consequently the present claims by Melita and Athena Picciotto were contained in the prior pending action. They are repetitive and unnecessary in the form of the present lawsuit. They require dismissal under Mass. R. Civ. P. 12(b)(9). See *Guindon Insurance Agency, Inc.* v. *CU Ins. Co.*, 15 Mass. App. Ct. 931, 932 (1983), and cases cited. "Everything raised on the second action, to the extent that it was not simply a carbon copy of the first, should have been the subject of a motion to amend the complaint."

4. *Collateral estoppel.* In addition, the present claims of tortious interference and conspiracy effectively went forward to adjudication on their merits in Civil Action 99-1594-A. The entry of summary judgment against the counterclaim counts against the attorneys for abuse of process and civil rights violation (by reason of their pursuit of their fee claims in 99-1594-A) comprised on adjudication. The resulting jury verdicts finding an entitlement to fees and expenses on the part of each of the attorneys and law firms constitutes an adjudication against the Picciottos' allegation of the wrongful or tortious character of the attorneys' post-settlement efforts by litigation and negotiation to collect their claimed fees and reimbursable expenses. These adjudications necessarily reject the present claim of wrongful interference and conspiracy asserted by Melita and Athena. Their collateral estoppel force is

conclusive. It furnishes a dispositive affirmative defense and ground for dismissal with prejudice as a mater of law under Mass. R. Civ. P. 12(b)(6). *Bagley* v. *Moxley*, 407 Mass. 633, 637 (1990); and *Osserman* v. *Jacobs*, 369 Mass. 201 and n.3 (1975). Consequently, collateral estoppel under Rule 12(b)(6) furnishes a separate, independent, and adequate ground for dismissal for all claims against the attorney parties in Counts One through Five.

5. As to Count Six against Travelers Indemnity Company for conspiracy, dismissal with prejudice is appropriate upon multiple independent grounds.

   (a) Under the undisputed terms of the Settlement Agreement of January 6, 1999, and of the Amended Settlement Agreement of March 12, 1999, all Picciotto parties (including Melita and Athena) effectively agreed to the escrow and interpleader process employed Travelers.

   (b) The court, by supervision of and distributions from the escrow fund, controlled the flow of money to the Picciotto parties. They cannot impute fault or liability to Travelers for the rulings and orders of the court.

   (c) Travelers refusal to accept the discovery demands of the Picciotto parties in Civil Action 99-1594-A resulted in and from rulings of the discovery master and judge, not from unilateral conduct by Travelers.

(d) The plaintiffs Melita and Athena have failed to plead any facts amounting to the "peculiar power of coercion" necessary for the cause of action of tortious civil conspiracy in Massachusetts. See *Massachusetts School of Law* v. *American Bar Association*, 952 F. Supp. 884, 890 (D. Mass. 1997); *Neustadt* v. *Employees Liability Assurance Corp., Ltd.*, 303 Mass. 321, 324-326 (1939) (full discussion and collection of authority); and *Caverno* v. *Fellows*, 286 Mass. 440, 443-444 (1934). That omission entitles Travelers to dismissal as a matter of law under Rule 12(b)(6).

CONCLUSION

1. The attorneys and law firms are entitled to dismissal with prejudice of Counts One through Five by reason of the presence of those claims in the prior pending action of Suffolk Civil Action no. 99-1594-A. Mass. R. Civ. P. 12(b)(9).

2. As an independent and adequate ground for dismissal with prejudice of Counts One through Five, collateral estoppel precludes those claims by reason of their prior adjudication against Melita and Athena Picciotto in Suffolk Civil Action No. 99-1594-A, Mass. R. Civ. P. 12(b)(6).

3. Undisputed facts furnish Travelers with a conclusive affirmative defense against the claim of civil conspiracy in Count Six. Independently, the absence of any allegations of a "peculiar power of coercion" leave the claim incomplete as a matter of law. Mass. R. Civ. P. 12(b)(6).

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Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: April 5, 2002